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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS G. CLARK, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

AND OTHER CASES

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as military trial and appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and nonjudicial duties, and appoint civilians to serve as military appellate judges?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial offices for fixed terms, and that military appellate judges be assigned to judicial duties as their primary duty?

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

Thomas G. Clark, U.S. Coast Guard
USCMA Dkt. No. 93-0212/CG
CGCMR Dkt. No. 994

Mark G. Danielson, U.S. Coast Guard
USCMA Dkt. No. 93-0331/CG
CGCMR Dkt. No. 997

Grady M. Dorman, U.S. Coast Guard
USCMA Dkt. No. 68294/CG
CGCMR Dkt. No. 986

Joseph P. Kovac, U.S. Coast Guard
USCMA Dkt. No. 93-0413/CG
CGCMR Dkt. No. 989

Stephan J. Prive, U.S. Coast Guard
USCMA Dkt. No. 68352/CG
CGCMR Dkt. No. 984

Joseph A. Taitano, U.S. Coast Guard
USCMA Dkt. No. 68493/CG
CGCMR Dkt. No. 988

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In The

Supreme Court of the United States

October Term, 1993

No. 93–

Thomas G. Clark, Petitioner

v.

The United States of America, Respondent
And Other Cases[1]

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

The petitioners, Thomas G. Clark, *et al.*, respectfully pray that writs of certiorari issue to review the judgments and opinions of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW

The order of the United States Court of Military Appeals, *United States v. Clark*, Dkt. No. 93-0212/CG (C.M.A. 24 September 1993) is reprinted as Appendix A at App. 1a. The opinion of the United States Coast Guard Court of Military

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[1] A full listing of the parties to this proceeding appears on page ii.

Review, *United States v. Clark*, Dkt. No. 994 (C.G.C.M.R. 19 November 1992), is reprinted as Appendix B at App. 3a.

The order of the United States Court of Military Appeals, *United States v. Danielson*, Dkt. No. 93-0331/CG (C.M.A. 24 September 1993) is reprinted as Appendix C at App. 7a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Danielson*, Dkt. No. 997 (C.G.C.M.R. 11 December 1992), is reprinted as Appendix D at App. 9a.

The order of the United States Court of Military Appeals, *United States v. Dorman*, Dkt. No. 68294/CG (C.M.A. 24 September 1993) is reprinted as Appendix E at App. 14a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Dorman*, Dkt. No. 986 (C.G.C.M.R. 7 July 1992), is reprinted as Appendix F at App. 16a.

The order of the United States Court of Military Appeals, *United States v. Kovac*, Dkt. No. 93-0413/CG (C.M.A. 24 September 1993) is reprinted as Appendix G at App. 19a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Kovac*, Dkt. No. 989 (C.G.C.M.R. 6 November 1992), is reprinted as Appendix H at App. 21a.

The order of the United States Court of Military Appeals, *United States v. Prive*, Dkt. No. 68352/CG (C.M.A. 24 September 1993) is reprinted as Appendix I at App. 42a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Prive*, Dkt. No. 984 (C.G.C.M.R. 6 July 1992), is reprinted as Appendix J at App. 44a.

The order of the United States Court of Military Appeals, *United States v. Taitano*, Dkt. No. 68493/CG (C.M.A. 24 September 1993) is reprinted as Appendix K at App. 69a. The opinion of the United States Coast Guard Court of

Military Review, *United States v. Taitano*, Dkt. No. 988 (C.G.C.M.R. 7 July 1992), is reprinted as Appendix L at App. 71a.

JURISDICTION

The decisions of the Court of Military Appeals were rendered on 24 September 1993. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3) (Supp. II 1990).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Articles 6, 16, 26, and 66, 10 U.S.C. §§ 806, 816, 826, and 866, are set forth in Appendix M at App. 74a. Rule for

Courts-Martial 1002, Manual for Courts-Martial, 1984, is set forth in Appendix N at App. 79a.

STATEMENT OF THE CASE

This is a consolidated petition representing all interested Coast Guard members of varying ranks whose court-martial convictions were affirmed by the Court of Military Appeals on 24 September 1993. In each case, the judicial appointment issue and the due process issue were raised. In each case, the Court of Military Appeals granted review, and rendered adverse summary dispositions in light of *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, ___ U.S. ___, 113 S. Ct. 2412, 124 L. Ed. 2d 635 (1993), and *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993), *petition for cert. filed*, No. 93-676 (U.S. 29 October 1993). Each case is factually distinct, but the facts critical to a resolution of these issues are similar in each case. Each case involved trial by a court-martial presided over by a military judge who was a commissioned officer who was not separately appointed to his judicial office by the president, the head of a department, or a court of law. Each case was reviewed in the Coast Guard Court of Military Review by a panel consisting partially of commissioned officers, and also containing at least one civilian judge. None of the judges involved have been appointed to any fixed term of judicial office.

This petition raises issues important to the military justice system. With respect to the questions presented, the basic issues have been previously raised to, and are to be decided by, this Court in *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, ___ U.S. ___, 113 S. Ct. 2412, 124 L. Ed. 2d 635 (1993) (No. 92-1482). This petition adopts and incorporates the same argument as set forth in *Weiss*, *supra*. In addition, however, with respect to the first question

presented, this petition presents an additional issue--the appointment by the Judge Advocate General of an Armed Force of civilians to serve as military appellate judges on the service Court of Military Review. Finally, the second question presented involves a related issue concerning the judicial independence of military appellate judges serving on the Coast Guard Court of Military Review as a mere collateral duty. These issues have been previously raised to this Court in *Carpenter*, 37 M.J. 291 (C.M.A. 1993), *petition for cert. filed*, No. 93-676 (U.S. 29 October 1993).

Like *United States v. Weiss* and *United States v. Carpenter*, this petition raises closely related questions which go to the heart of judicial independence for military trial judges who preside over courts-martial and for military appellate judges who review convictions. All military trial judges and most appellate military judges are commissioned officers and lawyers on active duty in their services. Unlike other judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Neither are they appointed by the President alone, the head of a department, or a court of law composed of Article I or III judges. Instead, military judges are selected and appointed by the Judge Advocate General of their service; in this case, the Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. § 801(1) (1988). The General Counsel has delegated most, but not all, of his duties as Judge Advocate General to the Chief Counsel of the Coast Guard, the senior uniformed lawyer of the service. *See* 49 CFR Part 1, Appendix A (1992). The Judge Advocate General is the official for each service who is responsible for the overall supervision of military justice matters. *See* Art. 6(a), UCMJ, 10 U.S.C. § 806(a) (1988). Moreover, the Judge Advocates General, in concert with other service officials,

have absolute and unreviewable discretion to remove or transfer judges out of their judicial assignments, and those judges lack protection if their decisions do not suit their Judge Advocate General. Finally, four of the five judges assigned to the Coast Guard Court of Military Review, including two of the three judges on each of the panels of the Court that reviewed petitioners' cases, serve on that court as a mere collateral duty. Each has other, primary duties, for which they are responsible to other officials, including, in some cases, the Chief Counsel. Accordingly, the method of appointment to judicial service in the Armed Forces violates the Appointments Clause; the lack of any fixed term of office, and the service of Court of Military Review judges on a collateral-duty basis, violates the Due Process Clause of the Fifth Amendment.

1. Institutional Framework

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five civilian judges appointed by the President with the advice and consent of the Senate for fixed terms of office. Art. 142, UCMJ, 10 U.S.C. § 942 (1988). The appointments and tenure of the Court of Military Appeals judges are not at issue in this case.

Below the Court of Military Appeals are four Courts of Military Review; one each for the Army, Air Force, Navy-Marine Corps, and Coast Guard. The Coast Guard Court of Military Review presently consists of five appellate military judges, two of whom are civilians (Chief Judge Baum and Judge Bridgman) and three of whom are Coast Guard commissioned officers. These judges have been appointed by the Judge Advocate General. Although the Courts of Military Review are permanent courts located in the Washington, D.C., area, none of the judges is appointed to a fixed term of

office. Art. 66(a), UCMJ, 10 U.S.C. § 866(a) (1988). The Courts of Military Review are typically divided into three-member panels to hear cases; petitioners' cases were reviewed by such three-member panels. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement for one year or more, a dismissal, or a dishonorable or bad-conduct discharge is part of the approved sentence. Art. 66(b), UCMJ, 10 U.S.C. § 866(b) (1988).

Military trial judges preside at special courts-martial, and, if qualified, at general courts-martial. Trial judges must be military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, selection and appointment as a judge is normally made by the Judge Advocate General of the service; in the Coast Guard, that authority has been delegated to the Chief Counsel of the Coast Guard. 49 CFR Part 1, App. A, para. 2(3) (1992). Like appellate military judges, the trial judges have no fixed terms of office. Art. 26(a)-(c), UCMJ, 10 U.S.C. § 826(a)-(c) (1988).

Each armed force assigns military judges as and when it sees fit. A judicial assignment can be terminated at any time through decertification as a judge or by transfer to other, nonjudicial, duties at the discretion of the Judge Advocate General of the judge's armed force. Art. 6, UCMJ, 10 U.S.C. § 806.

A court-martial can try any offense committed by a member of the armed services regardless of when or where the offense took place, who the victim was, what was done, or why it was done; the sole requirement for court-martial jurisdiction over the accused is that the accused was on active duty in the military at the time of the offense. *Solorio v. United States*, 483 U.S. 435 (1987). A general court-martial

may impose sentences that include death, imprisonment for life or a term of years, total forfeiture of pay and allowances, and a dishonorable or bad-conduct discharge (or a dismissal if the accused is an officer). Art. 18, UCMJ, 10 U.S.C. § 818 (1988). A bad-conduct or dishonorable discharge carries a permanent stigma, and it can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Maharajh*, 28 M.J. 797 (A.F.C.M.R. 1989). Special courts-martial may impose up to six months of confinement, forfeiture of up to two-thirds pay per month for six months, and a bad-conduct discharge. Art. 19, UCMJ, 10 U.S.C. § 819 (1988).

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trials in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf*, 35 M.J. 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [the jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." Art. 48, UCMJ, 10 U.S.C. § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge, because the court-martial trial judge is not bound by the Federal Sentencing Guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n. 3 (C.M.A. 1989); *see generally* Manual for Courts-Martial, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts, including those under the All Writs Act. 28 U.S.C. § 1651(a); *see Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court of military review "may affirm only such findings of guilty and the sentence as it finds correct in law and fact . . .. [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (1988).

2. Rulings of the Court of Military Appeals

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioners' claims that the manner in which the trial and appellate military judges in his case were appointed violated the Appointments Clause of the Constitution, and that the service of appellate military judges without fixed terms of office and as a mere collateral duty denied petitioners liberty without due process.

The legal background of these issues in the Court of Military Appeals is critical to a full understanding of this petition. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim with respect to fixed terms of office. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992).[2] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss's Appointments Clause argument and affirmed the Navy–Marine Corps Court's decision.

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[2] A petition for a writ of *certiorari* in *Graf* was filed on December 29, 1992 (No. 92–1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the Due Process issue.

In order to garner three votes, the majority in *Weiss* needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that Congress may establish a military justice system, but that Congress cannot declare an exemption for military judges from the Appointments Clause. Therefore, Judge Gierke held that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of a Department, or by a Court of Law. *Weiss*, 36 M.J. at 226. This proposition was endorsed by four of the court's five judges. 36 M.J. at 234, 240, 260.

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers" became "Military Judges" in the Military Justice Act of 1968, and thus no new appointment was necessary. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training: "The principle we glean from *Shoemaker* is that Congress may create a new office and give a military officer the duties of that office without making a new appointment necessary, if the duties are germane[.]" 36 M.J. at 228.

Judge Crawford eschewed the opinion of Judge Gierke, and concurred only in the result. In her view the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the land and naval forces. Her

opinion does not mention *Buckley v. Valeo*, 424 U.S. 1 (1976), in which this Court held that no class or type of officer is excluded from the reach of the Appointments Clause because of the special nature of their office or the plenary power of Congress over the subject area. Additionally, Judge Crawford reached her conclusion even though the Department of Justice (appearing as *amicus* and urging affirmance) disavowed that position in both its brief and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments in both of the majority opinions. The dissenters found no broad exemption to the strictures of the Appointments Clause based on the judges' status as military officers or military lawyers. 36 M.J. at 241, 258–259. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a "*professional judiciary*" in the military. 36 M.J. at 251 (emphasis in original). He recognized that what had occurred was no mere transfer of duties, but was a clear break from past practice by creating the new offices of military trial and appellate judge. Judge Wiss disagreed with the lead opinion's application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to some nebulous notion of duties of legally trained military officers in general," that is, to the duties of all judge advocates from which military judges are chosen. 36 M.J. at 262.

The Court of Military Appeals did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due

process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex re. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precludes fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C. area or for courts-martial such as these, which were held in the United States, not in a war zone.

The Court of Military Appeals' consideration of these issues in a Coast Guard case also produced four published opinions by the judges, though all judges voted to affirm that case. *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993), *petition for cert. filed*, No. 93-676 (U.S. 29 October 1993). Judge Gierke, joined by Judge Cox, authored the opinion of the court. Relying on the decision in *Weiss*, he concluded that the military judge who tried Carpenter's case and two of the three Coast Guard Court of Military Review judges (the two who were commissioned officers on active duty) who reviewed the case were appointed consistently with the Appointments Clause. *Carpenter*, 37 M.J. at 293. However, with respect to the third member of the Court of Military Review panel in the *Carpenter* case (and with respect to at least one Coast Guard Court of Military Review judge in each of these cases), Chief Judge Baum, who is a civilian, the *Weiss* decision is not controlling.

The Government argued at the Court of Military Appeals in *Carpenter* that Chief Judge Baum's (and, by implication, Judge Bridgman, the other civilian judge on the Coast Guard Court of Military Review) appointment to the Court of

Military Review by the Judge Advocate General was a proper appointment because the Judge Advocate General was acting by delegation from the Secretary of Transportation, the head of a department. The court rejected that argument, holding that the appointment power is not delegable. 37 M.J. at 294.

The Government next argued that, as a retired military officer, Chief Judge Baum was not a civilian, but remained a commissioned officer whose appointment as such made a separate appointment as a court of military review judge unnecessary in accordance with the *Weiss* decision. The court also rejected that contention. The court noted that Chief Judge Baum was employed and serving in a civilian, not a military, billet, he had not been recalled to active duty, and that judicial duties are not germane to the duties of a retired officer, because a retired officer has no duties. 37 M.J. at 295.

The court then concluded that Chief Judge Baum's (and, by implication, Judge Bridgman's) appointment to the court of military review was defective. 37 M.J. at 295. However, it afforded *de facto* validity to the acts of the Chief Judge, relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), and a January 15, 1993, memorandum of the Secretary of Transportation purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief Judge Baum. 37 M.J. at 295 and 294 fn. 1.

With respect to the Due Process issue, Judge Gierke concluded that there were sufficient protections to ensure the independence of the military judiciary. He held that there is no requirement for appellate military judges to serve as judges full time. 37 M.J. at 296.

Chief Judge Sullivan concurred based on the *de facto* appointment rationale. 37 M.J. at 300. Judge Crawford concurred in the opinion of the court with respect to the Due Process issue, but concurred only in the result with respect to

the Appointments Clause issue, relying on her separate opinion in *Weiss*. 37 M.J. at 300. Judge Wiss also concurred in the opinion of the court with respect to the Due Process issue, though he expressed misgivings about the "appearance of lack of total objectivity when associate appellate judges' principal assignments are as division chiefs under the immediate supervision of the Chief Counsel . . .." 37 M.J. at 301. He concurred only in the result, however, with respect to the Appointments Clause issue, also relying on the *de facto* appointment rationale. 37 M.J. at 300–301.

REASONS FOR GRANTING THE WRIT

This petition, like *Weiss*, seeks to establish minimum standards for the appointment of military judges, their retention in office for a fixed term, and service as an appellate military judge as a primary duty. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause, are available to those tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violations would seriously undermine the fairness of the military justice system; occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every justice system requires.

1. The Appointments Clause Violation

> Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924 (1987), has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as

does this one. *Weiss*, 36 M.J. at 256–257 (Wiss, J., dissenting).

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, Cl. 2; *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford in her separate opinion in *Weiss*, and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. With the exception of the after-the-fact appointment of the judges of the Coast Guard Court of Military Review by the Secretary of Transportation, no court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause. The only question with respect to judges who are commissioned officers, is whether their appointment as military judges, after they have been duly appointed as military officers, must be made by one of the authorities set forth in the Appointments Clause. With respect to appellate military judges who are civilians, the question is whether an after-the-fact appointment by the service Secretary provides *de facto* validity to the prior judicial acts of the judge.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. As this Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. For example, *the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch*. Neither Congress nor the Executive can agree to waive this structural protection . . .. The structural interests protected by the appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).

Relying on *Shoemaker*, two Court of Military Appeals judges found that the Appointments Clause had been satisfied for all military judges who are commissioned officers of the Armed Forces, because they have already been nominated by the President and confirmed by the Senate, although they have not been appointed to their judicial positions in that manner. Apparently recognizing that a presidential appointment had *some* limits--for example, a Deputy Secretary of Defense could not simply move over to become an Assistant Attorney General or a member of the Equal Employment Opportunity Commission--the opinion also concluded that there was no new office created when Congress amended the Uniform Code of Military Justice in 1968 to create the positions of military trial and appellate judges because the new positions were simply continuations of the old ones, with some modest changes. 36 M.J. at 229-230. Even if that assessment were

correct, and petitioners agree with the dissenters in *Weiss* that it is not, that would at most allow those who were in a judicial position in 1968--the "incumbent[s]" in *Shoemaker's* words (147 U.S. at 301)--to continue in office without a new appointment. Stated another way, *Shoemaker* can at most solve the problem for those who were already serving in judicial positions in 1968, not for those who were yet to be appointed as judges, let alone those who were not yet military lawyers or even military officers.

As a fall-back Judges Gierke and Cox argued that, under *Shoemaker*, Congress can add duties to an *existing* office without requiring that the person then in office be reappointed, so long as the "new" duties are "germane" to the "old" ones of that office. What they overlook is that *Shoemaker* arose in a one-time situation where Congress had added duties to persons who were already in offices to which they had been properly appointed. But there would never be a problem for future occupants of those offices since they would be appointed to positions encompassing both the "new" and "old" duties. However, for military judgeships, the problem is repeated whenever a non-judge military lawyer replaces a military judge who retires or is transferred to a new assignment.

Even if *Shoemaker* allowed those who were serving as "law officers" in 1968 to continue in the new office of military judge, those who became military judges thereafter would fail to meet *Shoemaker's* "germaneness" test. The duties and powers of military judges, including all of those involved in petitioners' cases, are so different from those of prosecutor, defense counsel, or legal advisor to a command--which is what most military lawyers do before they become military judges--that there is not simply an addition of a related duty, as in *Shoemaker*, but a substitution of a new job, with entirely new functions, for an old one. Surely, no one

would contend that the two civilians on the Coast Guard Court of Military Review could be plucked from civilian life, even if they were administrative law judges working for the federal government, and placed on that court without meeting the requirements of the Appointments Clause; the result should be no different for any other military judge, whether at the trial or appellate level. Similarly, no one would assume that a member of the staff of the General Counsel of the National Labor Relations Board could simply be "assigned" the additional duties of administrative law judge at that agency without satisfying the requirements of the Appointments Clause, yet that is the effect of the ruling below in this case and in *Weiss*. Indeed, as both *Buckley* and *Freytag* make clear, it is the function that the individual is performing that is determinative of whether the Appointments Clause applies at all, and under that analysis there can be no question that military judges must be separately appointed because their functions differ so markedly from those performed by other military lawyers. At the very least, these quite expansive extensions of *Shoemaker* raise serious questions that this Court should address.

The decision in *Weiss* rests on even shakier ground because the decisive vote was cast by Judge Crawford. She implicitly rejected an extension of *Shoemaker* in favor of a much more sweeping rationale--that the Appointments Clause does not apply at all to military judges, although her rationale would lead to the conclusion that the Clause does not apply to any appointments in the Armed Forces. Her opinion conflicts with, but does not even attempt to distinguish, *Buckley*, which made clear that there are no subject-matter exemptions from the Appointments Clause based on the interest of Congress in, or plenary power over, particular subject areas. Judge Crawford's rationale also conflicts with decisions like *Rostker v. Goldberg*, 453 U.S. 57

(1981), and *Middendorf v. Henry*, 425 U.S. 25 (1976), which stand for the proposition that there are no wholesale exemptions from the Constitution simply because the case involves military affairs. Indeed, so extreme is Judge Crawford's ruling that the Department of Justice, which appeared below as an *amicus* in support of respondent, specifically rejected that position in its brief and at oral argument. It is highly unlikely that Judge Crawford would have taken this far more expansive route to affirming *Weiss's* conviction if she had been willing to accept the rationale put forward by Judge Gierke. Thus, if her "deference to Congress" analysis is in error--as it clearly seems to be--there were three votes to overturn *Weiss's* conviction.

The Court of Military Appeals upheld Carpenter's conviction and sentence, despite the improper appointment of Chief Judge Baum of the Coast Guard Court of Military Review, a civilian, by relying on the *de facto* appointment rationale. 37 M.J. at 295. In reaching that result, however, the court devoted only a single sentence to discussing the issue, and cited only one case, *Buckley v. Valeo*, 424 U.S. 1 (1976). However, *Buckley* was an action seeking declaratory and injunctive relief to enjoin the operation of the statutory provisions concerning the Federal Election Commission, not a direct appeal of a criminal conviction, and does not support the action of the lower court.

The *de facto* appointment rationale has been applied to limit the consequences of improper appointments of officeholders, particularly when the defect is of a technical nature, or when many innocent third parties would be harmed by their reliance on the acts of the improperly appointed official, as in *Buckley*. The doctrine is clearly not simple. *See Andrade v. Lauer*, 729 F.2d 1475, 1496–1501 (D.C. Cir. 1984). If it is to be extended to these circumstances, it should be done by this Court, with a full discussion of the matter. It

has never been applied in a case like this. The only federal criminal case in which the doctrine was relied on to sustain a conviction on a direct appeal, is *McDowell v. United States*, 159 U.S. 596 (1895). The doctrine was only an alternative basis for affirming the conviction there, and the facts of *McDowell* are substantially different from petitioner's case. In *McDowell*, a properly appointed federal district judge had been assigned to sit in a case in a different district, but the procedures followed in the assignment were challenged. This Court found the error in the assignment to be very minor and technical, if error at all, and refused to overturn the defendant's conviction. The key difference from this case, however, was that the district judge in *McDowell* had been properly appointed and commissioned by the President with the consent of the Senate as a district judge; it was only his temporary inter-district assignment that was in question.

The validity of the appointment of military judges, commissioned or civilian, under the Appointments Clause is a significant constitutional question which this Court should address. The 2-1-2 division within the Court of Military Appeals in *Weiss*, and the four-opinion decision of that court in the *Carpenter* case reflects the serious debate on the merits of the issue. As it did in *Weiss*, this Court should grant review to resolve this issue as promptly as possible.

2. The Due Process Violation

Most of the reasons this Court should grant review on the second question presented are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two questions presented arise under different constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that

there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military trial and appellate judges, yet he is also responsible for supervising the efficient working of the service's military justice system, including its prosecutors.

The Court of Military Appeal's application of *Medina's* Fourteenth Amendment due process analysis in *Graf* to a federal Fifth Amendment due process claim is ample reason to resolve this issue. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions--*United States v. Raddatz*, 447 U.S. 667, 677 (1980)--which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioner believes that respect for state legislative judgments and concerns of federalism, which loom so large in *Medina*, have no place where federal Due Process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve. In that regard petitioner also notes that the concerns about overturning specific judgments made by state legislatures (*Medina*), or with those made by Congress for the Armed Forces (*Middendorf v. Henry*, 425 U.S. 25, 44 (1976)), are inapplicable here because there is no evidence that in 1968, when Congress established the offices of military trial and appellate judge, it gave any thought to terms of office, let alone specifically legislated to preclude them.

The concerns raised by the lack of any fixed term of office are only exacerbated for four of the five Coast Guard Court of Military Review judges by their assignment as judges on a collateral-duty basis only. This arrangement implies that the duties of an appellate judge are simply not important enough for full-time, or even primary duty, assignment. The part-time judges are supervised and evaluated on their performance of their primary, nonjudicial

duties. Thus, devotion to their judicial duties could only detract from the performance of their primary duties, on which their evaluations, future promotions, and assignments depend. Furthermore, for many of the part-time judges, the Chief Counsel, the senior uniformed lawyer in the Coast Guard, is their immediate supervisor; concern about issuing judicial decisions contrary to his wishes may impinge on the independence so vital to the proper performance of judicial duties.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other alleged protections against improper retaliation against military judges for unpopular decisions, although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. *Graf*, 35 M.J. at 455-460. Even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable problems of adverse or "faint praise" evaluations that can have significant impacts on promotions, future assignments, and susceptibility for involuntary early retirement for all military judges.

At bottom, the Court of Military Appeals fell woefully short of justifying an exception to the generally-accepted principle of American jurisprudence, as reflected in such due process cases as *Tumey v. Ohio*, 274 U.S. 510 (1927), and in the nearly universal fact that state judges have fixed terms of office, such that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute

minimum protection for the accused. The due process issue alone is sufficiently important to warrant consideration by this Court, especially because the terms of office of a military judge can be cut short by a military officer who is the ultimate superior of both the judge and the prosecutor.

CONCLUSION

For the reasons stated, petitioners pray that this Court grant review of the questions presented in order to bring the military court-martial system into line with accepted principles of American jurisprudence, and ensure that trials by court-martial are conducted and reviewed in a fair and impartial manner.

Respectfully submitted,

Allen Lotz
Lieutenant Commander, U.S. Coast Guard
Commandant (G-LMJ)
U.S. Coast Guard
2100 2nd Street, S.W.
Washington, DC 20593-0001
(202) 267-0115
Attorney for Petitioners

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0212/CG

CMR No. 994

United States, Appellee

v.

Thomas G. Clark, Appellant

ORDER

On further consideration of the granted issues (37 MJ 247) in light of *United States v. Carpenter*, 37 MJ 291 (CMA 1993) it is by the Court, this 24th day of September 1993

ORDERED:

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of
the Court

CRAWFORD, Judge: I concur with the resolution of the question of part-time judges on the Court of Military Review. However, as to application of the Appointments Clause of the Constitution to these judges, I concur only in the result. *See* my separate opinions in *United States v. Carpenter*, 37 MJ 291, 300 (CMA 1993) and *United States v. Weiss*, 36 MJ 224 (CMA 1992).

APPENDIX B

UNITED STATES COAST GUARD

COURT OF MILITARY REVIEW

CGCM No. 0059

Docket No. 994

United States

v.

Thomas G. Clark, Chief Gunner's Mate

U.S. Coast Guard

November 19, 1992

General Court-Martial convened by Commander, Fourteenth Coast Guard District. Tried at the Office of the Commander, Fourteenth Coast Guard District, Honolulu, Hawaii on 6 April 1992.

Military Judge: CAPT Douglas A. Smith, USCG

Trial Counsel: LT Kent L. Booher, USCGR

Detailed Defense Counsel: LT Linden H. Joesting, USCGR

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LT Garland M. Walker, USCGR

BEFORE

PANEL FIVE

BAUM, GRACE AND EDWARDS

Appellate Military Judges

PER CURIAM:

Appellant has assigned four errors: that the sentence approved by the convening authority is not appropriate in light of the disparity between Appellant's sentence and that of an accused in a closely related case; that the military judge and the judges of this Court were appointed in violation of the Constitution's Appointments Clause; that due process requires a judge in a criminal case to have a fixed term of office; and that the presence of collateral duty judges on this Court denies Appellant due process of law. Assignments of Error II, III and IV have been raised in other cases before this Court and have been decided contrary to Appellant's position here. *U.S. v. Ryder*, 34 M.J. 1259 (C.G.C.M.R. 1992); *U.S. v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *U.S. v. Kovac*, 36 M.J. 521 (C.G.C.M.R. 1992). Those decisions are dispositive. Assignments II, III and IV are, therefore, rejected.

In Assignment of Error I, Appellant contends that his sentence and that of Chief Warrant Officer (W-4) Karl Kier, a retired warrant officer convicted of similar charges are highly disparate. In order to correct the asserted disparity, Appellant asks this Court to disapprove his reduction from E-7 to E-4. This request is rejected because we do not consider the sentences in these two cases to be highly disparate, as contended by Appellant. In reaching this conclusion, we have accepted for consideration the appendices attached to the briefs filed by Appellant and the Government.

After action by the convening authority, Appellant's sentence consists of a suspended bad conduct discharge, 53 days confinement that was served, with the remainder suspended, forfeiture of $100 per month for 10 months, and reduction from E-7 to E-4. Chief Warrant Officer (W-4) Kier, who was in a retired status when tried, was sentenced to 4 months confinement and a $1,000 fine. These are not highly disparate sentences in our view, but, even if they were, the law does not require our comparing them and making adjustments accordingly. In fact, Appellant acknowledges that the general rule is that determinations of sentence appropriateness should be made without reference or comparison to sentences in other cases.

As pointed out by the Government, these are two different people with differing records and different extenuation and mitigation evidence bearing on the sentences. A mechanical comparison of the two sentences in this case is simply not helpful. We have evaluated Appellant's sentence on the basis of his own case applying the combined experience of this panel's judges to determine whether Appellant's sentence is appropriate in light of the facts. Our review of this record convinces us that the sentence is appropriate for this accused and his offenses.

After review pursuant to Article 66, Uniform Code of Military Justice, the findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum and Judges Grace and Edwards concur.

For the Court

/s/

JENIFER A. SANIDAD

Clerk of the Court

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 93-0331/CG

CMR No. 997

United States, Appellee

v.

Mark G. Danielson, Appellant

ORDER

On further consideration of the granted issues (Daily Journal, April 21, 1993) in light of *United States v. Carpenter*, 37 MJ 291 (CMA 1993), it is by the Court, this 24th day of September 1993

ORDERED:

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of
the Court

CRAWFORD, Judge: I concur with the resolution of the question of part-time judges on the Court of Military Review. However, as to application of the Appointments Clause of the Constitution to these judges, I concur only in the result. *See* my separate opinions in *United States v. Carpenter*, 37 MJ 291, 300 (CMA 1993) and *United States v. Weiss*, 36 MJ 224 (CMA 1992).

APPENDIX D

UNITED STATES COAST GUARD

COURT OF MILITARY REVIEW

CGCM No. 0061

Docket No. 997

United States

v.

Mark G. Danielson, Jr.

Seaman Recruit, U.S. Coast Guard

December 11, 1992

General Court-Martial convened by Commander, Maintenance and Logistics Command Pacific. Tried at Commander, Thirteenth Coast Guard District, Seattle, Washington on 9 April 1992.

Military Judge: CAPT Douglas A. Smith, USCG

Trial Counsel: LCDR Peter L. Seidler, USCG

Detailed Defense Counsel: LT Valerie J. Hilicus-Pellegrino, JAGC, USNR

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LT Garland M. Walker, USCGR

BEFORE

PANEL TWO

BAUM, GRACE AND BASTEK

Appellate Military Judges

PER CURIAM:

Appellant was convicted by general court-martial of various offenses in accordance with his pleas of guilty entered pursuant to a pretrial agreement.[1] Officer members sentenced Appellant to a bad conduct discharge, confinement for three years, and forfeiture of $525 pay per month for thirty-six months. The convening authority approved the sentence, but suspended confinement in excess of 24 months for a period of 12 months in accordance with the terms of the pretrial agreement. Before this Court, Appellant has assigned the following errors:

I

IMPROPER EVIDENCE RESULTED IN A SENTENCE MORE SEVERE THAN APPELLANT WOULD HAVE RECEIVED IN THE ABSENCE OF THE IMPROPER EVIDENCE

---

[1] Appellant was found guilty of the following offenses: one specification of unauthorized absence for three and a half months; one specification of wrongful appropriation of an automobile; one specification of larceny of an automobile; nine specifications of making checks with insufficient funds; and one specification of wrongful possession of another's military identification card in violation of Articles 86, 121, 123a, ad 134, Uniform Code of Military Justice.

II

THE SPECIAL COURT-MARTIAL MILITARY JUDGE AND THE JUDGES OF THIS COURT WERE APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. *BUT SEE UNITED STATES V. RYDER*, 34 M. J. 1259 (C.G.C.M.R. 1992); *UNITED STATES V. PRIVE*, 35 M.J. 569 (C.G.C.M.R. 1992)

III

THE PRESENCE OF COLLATERAL DUTY JUDGES UPON THIS COURT DENIES APPELLANT DUE PROCESS OF LAW

Oral argument having been heard on the first assignment of error, the case is ready for decision.

I

Prosecution Exhibit 3, a form entry from Appellant's personnel record reflecting a prior special court-martial conviction, was admitted in evidence prior to sentencing. On that form, at the end of the narrative summary of the prior offenses, the notation "(CONT)" appears. This notation was in error because it was determined, upon inquiry by the military judge, that there was no continuation of the narrative description of the offenses. The defense counsel objected to the exhibit being considered without correction of that notation because of the potential for misleading the members into thinking that Appellant had been convicted of additional offenses at the earlier trial not reflected in the exhibit. In response, the military judge indicated that he would instruct the members to disregard the notation, but, when instructions were given, that particular instruction was omitted. No objection or request for additional instructions was made by defense counsel at that point, however.

Appellant now contends that this oversight by the judge left the members with an unexplained mystery, which would naturally tend to lead them to impose a more severe sentence. Accordingly, he suggests reassessment and reduction of the confinement and forfeitures to one year in lieu of remand of the record. We choose neither. First and, foremost, we consider silence by the defense at the time the instructions were given constituted waiver. Furthermore, we do not deem the failure to instruct rises to the level of plain error to warrant rejection of the waiver. Finally, we believe the failure to instruct on this matter to be harmless beyond a reasonable doubt.

In this regard, we are aware of the view expressed by then Chief Judge Everett in *U.S. v. Sales*, 22 M.J. 305 (C.M.A. 1986), that "if the error at trial was one of constitutional magnitude, then it would seem necessary that the Court of Military Review should be persuaded beyond a reasonable doubt that its reassessment has rendered harmless any error affecting the sentence adjudged at trial." *Id.* at 307. See also *U.S. v. Miller*, 23 MJ. 837 (C.G.C.M.R. 1987). Certainly, the error asserted here is not of constitutional magnitude, so, at most, assuming error, we must determine only that the error was harmless in order to affirm. Nevertheless, at the urging of Appellant's counsel during oral argument, we have applied the more rigorous constitutional standard and have assured ourselves that the notation "(CONT)" was harmless beyond a reasonable doubt. Assignment of Error I is rejected.

II and III

Assignments of Error II and III have been raised in other cases before this Court and have been decided contrary to the Appellant's position here. *U.S. v. Ryder*, 34 M.J. 1259

(C.G.C.M.R. 1992); *U.S. v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *U.S. v. Kovac*, ____ M.J. ___ (C.G.C.M.R. Dkt. No. 989 November 6, 1992). Those decisions are dispositive. Assignments II and III are, therefore, rejected.

After review pursuant to Article 66, Uniform Code of Military Justice, the findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and sentence as approved and partially suspended below are affirmed.

Judges Grace and Bastek concur.

For the Court

/s/

JENIFER A. SANIDAD

Clerk of the Court

APPENDIX E

U.S. COURT OF MILITARY APPEALS

No. 68294/CG

CMR No. 986

United States, Appellee

v.

Grady M. Dorman, Appellant

ORDER

On further consideration of the granted issues (37 MJ 247) in light of *United States v. Carpenter*, 37 MJ 291 (CMA 1993), and *United States v. Graf*, it is by the Court, this 24th day of September 1993

ORDERED:

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of
the Court

CRAWFORD, Judge: I concur with the resolution of the questions of part-time judges on the Court of Military Review and as to whether they need to be appointed for fixed terms. However, as to application of the Appointments Clause of the Constitution to these judges, I concur only in the result. *See* my separate opinions in *United States v. Carpenter*, 37 MJ 291, 300 (CMA 1993) and *United States v. Weiss*, 36 MJ 224 (CMA 1992).

APPENDIX F

UNITED STATES COAST GUARD

COURT OF MILITARY REVIEW

CGCM No. 0052

Docket No. 986

United States

v.

Grady M. Dorman

Chief Boatswain's Mate, U.S. Coast Guard

July 7, 1992

General Court-Martial convened by Commander, Maintenance and Logistics Command Pacific. Tried at Coast Guard Island, Alameda, California on 26 November 1991

Military Judge: CAPT Douglas A. Smith, USCG

Trial Counsel: LCDR Craig H. Allen, USCG

Detailed Defense Counsel: LT Kevin F. Bruen, JAGC, USNR

Appellate Defense Counsel: LCDR G Arthur Robbins, USCG

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

BEFORE

PANEL TWO

BAUM, GRACE AND BASTEK

Appellate Military Judges

PER CURIAM:

The following three assignments of error have been summarily asserted by Appellant:

I

APPELLANT'S CONVICTION MUST BE SET ASIDE BECAUSE DUE PROCESS REQUIRES THAT A JUDGE IN A CRIMINAL CASE HAVE A FIXED TERM OF OFFICE. *BUT SEE UNITED STATES V. GRAF*, 32 M.J. 809 (N.M.C.M.R. 1990), *PETITION GRANTED*, 33 M.J. 189 (C.M.A. 1991)(MEM.).

II

APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLTION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

III

THE COURT OF MILITARY REVIEW IS WITHOUT POWER TO AFFIRM THE FINDINGS OF GUILTY AND SENTENCE BECAUSE THE APPELLATE MILITARY JUDGES ARE ASSIGNED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

These assignments, after briefing and consideration in two other cases, were rejected by this Court. *U.S. v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *U.S. v. Ryder*, 34 M.J. 1259 (C.G.C.M.R. 1992). Those decisions are dispositive. No other specific issues have been raised by Appellant apart from the three summary assignments. Without admitting that the findings and sentence are correct in fact and law, he has submitted his case on its merits.

Having rejected Appellant's jurisdictional and due process assertions, we have reviewed this record pursuant to Article 66, Uniform Code of Military Justice. Upon such review, we find no error which materially prejudiced the substantial rights of the accused and we do not consider the sentence to be excessive. The findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and suspended sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum and Judges Grace and Bastek concur.

For the Court

/s/

JENIFER A. SANIDAD

Clerk of the Court

APPENDIX G

U.S. COURT OF MILITARY APPEALS

No. 93-0413/CG

CMR No. 989

United States, Appellee

v.

Joseph P. Kovac, Appellant

ORDER

On further consideration of the granted issues (Daily Journal, May 4, 1993) in light of *United States v. Carpenter*, 37 MJ 291 (CMA 1993) it is by the Court, this 24th day of September 1993

ORDERED:

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of
the Court

CRAWFORD, Judge: I concur with the resolution of the question of part-time judges on the Court of Military Review. However, as to application of the Appointments Clause of the Constitution to these judges, I concur only in the result. *See* my separate opinions in *United States v. Carpenter*, 37 MJ 291, 300 (CMA 1993) and *United States v. Weiss*, 36 MJ 224 (CMA 1992).

APPENDIX H

UNITED STATES COAST GUARD

COURT OF MILITARY REVIEW

CGCM No. 0055

Docket No. 989

United States

v.

Joseph P. Kovac, Aviation Structural

Mechanic Third Class, U.S. Coast Guard

November 6, 1992

36 M.J. 521

General Court-Martial convened by Commander, First Coast Guard District. Tried at U.S. Naval Base, Newport, Rhode Island from 7 October to 11 October 1991.

Military Judge: CAPT Douglas A. Smith, USCG

Trial Counsel: LT John B. Gately, USCG

Detailed Defense Counsel: LCDR Christopher A. Abel, USCG

Appellate Defense Counsel: LCDR G Arthur Robbins, USCG (Brief)

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

BEFORE

PANEL SIX

BAUM, BRIDGMAN AND BASTEK

Appellate Military Judges

BAUM, Chief Judge:

Appellant was tried by general court-martial on charges of rape, forcible sodomy and adultery in violation of Articles 120, 125 and 134, Uniform Code of Military Justice (UCMJ). He pled not guilty to all offenses and, despite his pleas, was convicted by officer members of one specification of rape and one specification of adultery as charged. The judge, however, found the adultery offense multiplicious for findings with rape and dismissed it upon the Government's electing to proceed to sentencing on the rape finding. Appellant was also convicted of one specification of indecent assault in violation of Article 134, UCMJ, as a lesser included offense of sodomy. The court sentenced Appellant to a bad conduct discharge, confinement for six months, forfeiture of $ 200 pay per month for six months and reduction to E-1. The convening authority approved the sentence as adjudged. Before this Court, Appellant has assigned the following errors:

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

Pages 23a & 24a

Nevertheless, according to Seaman Apprentice S's testimony, while having a beer and watching TV, Appellant tried to kiss her. Whereupon, she told him to take her back to the station. Instead, according to Seaman Apprentice S, he grabbed her shoulders and pushed her down on the bed. He continued his uninvited forceful actions, despite her protests, removing clothing, and ultimately penetrating her against her will.

The evidence of record leads us to believe that Appellant fully intended from the outset to have sex with Seaman Apprentice S, whether she objected or not. Seaman Apprentice S did object and did resist, manifesting her lack of consent both verbally and physically. We are convinced beyond a reasonable doubt that Appellant understood the words and actions of Seaman Apprentice S to mean she did not consent to sexual intercourse and that he forcibly overcame her objections and her physical resistance. In resolving the facts, we have considered Appendices A and B to Appellant's brief. The motion to file the appendices, contained in a footnote to Appellant's brief, is granted. Assignment of Error I is rejected.

Assignment of Error II

In Assignment II, Appellant asserts that the judge committed plain error by leaving a key word out of stipulated testimony read to the court members. Appellant contends that without the missing word the impact of the expected testimony was almost entirely reversed. In response, the Government submits that, "after evaluating the military judge's omission of this one single word against all of the evidence in this 1221 page record, it is obvious that the error was harmless." Appellate Government Counsel's brief at 12. We agree with the Government in this regard and in the view

that Appellant's failure to object to the omission at trial constituted waiver. Assignment of Error II is rejected.

Assignment of Error III

In Assignment of Error III, Appellant contends that the trial judge was appointed in violation of the Appointments Clause of the Constitution. That assertion has also been made with respect to the judges on this Court as part of Assignment IV. Both contentions were addressed and resolved by this Court in *U.S. v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), which found the Appointments Clause inapplicable to the courts and judges provided for by Congress' rules for the government and regulation of the land and naval forces. Furthermore, we agreed with the rationale of *U.S. v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992), which found that the Constitution's Appointments Clause was satisfied by the presidential appointment of commissioned officers, assuming *arguendo* that the Clause applied to military judges. Assignment of Error III is rejected.

Assignment of Error IV

A.

Appointment of C.G.C.M.R. Judges

In Assignment IV, Appellant challenges the authority of this Court on three separate grounds. The first ground is the one presented in Assignment of Error III, relating to the Constitution's Appointments Clause and, as indicated already, has been resolved contrary to Appellant's position in *U.S. v. Prive, supra*, and *U.S. v. Coffman, supra*. Before leaving the subject, however, there are aspects that warrant further explication. In *U.S. v. Prive, supra*, this Court concluded from a long line of United States Supreme Court decisions

that certain constitutional principles are treated differently when applied to the military. There is good reason for this approach.

Discipline is essential if the military is to meet its mission. The very survival of the nation may depend on individual members obeying orders without hesitation. Supreme Court decisions, recognizing this fact, have consistently adhered to the proposition that an effective fighting force, by its very nature, cannot comport with every constitutional provision in the same way as society at large, particularly when the matter at issue relates to military discipline. Consequently, the Supreme Court has accorded great latitude to congressional action under Article I, § 8, cl. 14 of the Constitution, when such action bears on military discipline.

Pursuant to that constitutional mandate, "To make Rules for the Government and Regulation of the land and naval Forces," Congress in 1950 created the Uniform Code of Military Justice, a criminal justice system which carefully balanced the competing interests of military discipline and individual rights. In so doing, a form of due process known as military due process was given real meaning by Congress. Then, in 1968, for the first time in our history, Congress incorporated into that system a military trial and appellate judiciary to buttress that concept of military due process. In keeping with the historic role of the Judge Advocates General in disciplinary matters, Congress placed appointment authority for these new judges in the hands of the Judge Advocates General of the various armed services. While the idea of a military judiciary was new, the important position and authority of the Judge Advocate General in the military justice system was not.

Appellant's assignment of error calls into question this key role of the Judge Advocate General in the military disciplinary system. Thus, this Court, and other courts as well, have been asked to strike down that authority as unconstitutional. In response, the words of former Chief Justice Warren, quoted with approval by then Chief Justice Burger in *Chappell v. Wallace*, 462 U.S. 296, 305, 103 S.Ct. 2362, 2368 (1983), and set out in my separate opinion in *U.S. v. Prive* at 35 M.J. 578 have direct applicability: "The special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'"

For a court, at this point, to interfere with this congressionally designed military judicial establishment by invoking case decisions that until now have applied only to civilian institutions would be an intrusion upon military authority with possibly unforeseen deleterious impact on discipline. It should be left to Congress to determine that impact and what, if any, changes to the system might be warranted by *Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631 (1991), or the other matters set forth in my separate opinion in *U.S. v. Prive* at 35 M.J. 578 n.1.

There is another and even more basic reason that militates against a court decision at this time on the subject of *Freytag's* applicability. The instant case can and should be decided on a basis that does not require a determination of the Uniform Code of Military Justice's constitutionality. The make-up of this Court is such that the rationale of *U.S. v. Coffman, supra*, which dealt with appointment of trial judges, applies with equal force at this level. Thus, there is no need to address the question whether the Uniform Code of Military

Justice provision relating to assignment of appellate military judges is constitutional.

As in *Coffman*, if we assume *arguendo* that the appointment of those who serve as court of military review judges must meet the terms of Article II, § 2, cl. 2 of the United States Constitution, we find that those terms are met when commissioned officers are assigned as court of military review judges. Since commissioned officers have been assigned as judges on this Court in all instances, the requirements of the United States Constitution have been met.

Our conclusion is reached in the following manner. Article II, § 2, cl. 2 of the United States Constitution says:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Pursuant to that clause, as *U.S. v. Coffman, supra*, declares, commissioned officers of the various military branches are appointed by the President with the advice and consent of the Senate. Based on that fact, and assuming *arguendo* that the Appointments Clause applies to military judges, the Navy-Marine Corps Court of Military Review, in *U.S. v. Coffman, supra*, determined that, "A second appointment from the President to a commissioned officer to perform the duties of a military judge is simply not required."

Id. at 592. We agree with that determination and find it equally applicable to the judges on the Coast Guard Court of Military Review.

Three of the judges on this Court are Coast Guard commissioned officers serving on active duty in the rank of captain. As explained in my separate opinion in *U.S. v. Prive*, 35 M.J. 579, Judge Bridgman and I are retired commissioned officers. Both of us retired with over 20 years of active service before our present assignment as appellate military judges, I, as a captain in the United States Navy and Judge Bridgman as a captain in the United States Coast Guard. The General Counsel, Department of Transportation, as the Judge Advocate General of the Coast Guard,[1] assigned us and the other judges to this Court pursuant to Article 66, UCMJ, which says: "Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians. . . ."

Since assignment to the Court could be either as a civilian or as a commissioned officer, little thought had to be given to which term fit more precisely. Suffice it to say, since Judge Bridgman and I were, and still are, civilian employees of the Coast Guard, we thought of ourselves as civilians, knowing also that we maintained a continuing status as commissioned officers, albeit in a retired capacity. That continuing status was clearly recognized by the United States Supreme Court in *McCarty v. McCarty*, 101 S.Ct. 2728 (1981) when it said:

> The retired officer remains a member of the Army, see *United States v. Tyler*, 105 U.S. 244, 26 L.Ed. 985 (1882), and continues to be subject to the Uniform Code

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[1] Art. 1(1), UCMJ, 10 U.S.C. § 801(1)

> of Military Justice, see 10 U.S.C. § 802(4). See also *Hooper v. United States*, 164 Ct.Cl. 151, 326 F.2d 982, cert. denied, 377 U.S. 977, 84 S.Ct. 1882, 12 L.Ed.2d 746 (1964). In addition, he may forfeit all or part of his retired pay if he engages in certain activities. Finally, the retired officer remains subject to recall to active duty by the Secretary of the Army "at any time." Pub. L. 96-513, § 106, 94 Stat. 2868. These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services. In *United States v. Tyler*, 105 U.S., at 245, the Court stated that retired pay is "compensation . . . continued at a reduced rate, and the connection is continued, with a retirement from active service only." (Footnotes omitted).

Id. at 2735-2736.

A recent amendment to the Uniform Code of Military Justice appears to settle the issue that, as between the two categories, commissioned officer or civilian, it is as commissioned officers that Judge Bridgman and I are assigned to this Court rather than as civilians.

In 1990, Article 142, UCMJ, which relates to the United States Court of Military Appeals, was amended by the following addition:

> "For purposes of appointment of judges to the court [U.S. Court of Military Appeals], a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life."

Art. 142(b)(4), UCMJ, 10 U.S.C. § 942(b)(4).

While Article 66, UCMJ, the provision governing courts of military review, has not been so amended, certain basic rules of statutory construction lead ineluctably to the conclusion that Judge Bridgman and I "shall not be considered to be in civilian life" for purposes of assignment to the United States Coast Guard Court of Military Review.

When construing statutory clauses, one should look first to definitions or declared constructions within the statute because: "The legislature may define, in a statute, words or phrases used therein and may declare in the body of an act the construction to be placed thereon." 82 C.J.S. *Statutes* § 315 at 536. In this respect, the Uniform Code of Military Justice neither defined nor declared the construction to be placed on the word "civilian" before 1990.

Even if the term had been previously defined, however, "a subsequent amendment to a statute may operate to widen the meaning of [that] term." 82 C.J.S. § 315 at 539. Furthermore, in this regard, it is "presumed that the legislature acted with deliberation, with knowledge of the effect of its act, and with a purpose in view, and that the provisions of the act were formulated in harmony therewith." 82 C.J.S. § 315 at 540–541. It is also, "presumed that the legislature intended to apply the same rule to different states of facts where these are manifestly within one and the same reason," and, finally, "presumptions are indulged against contradictory provisions." 82 C.J.S. § 315 at 548 and 547.

Upon application of these rules of construction, we are convinced that assignment of all the judges to this Court was in their capacity as "commissioned officers." Granted, Judge Bridgman and I are not on active duty, as are the other three judges, but the Uniform Code of Military Justice does not limit judicial assignments of commissioned officers to those

on active duty. If such a limitation had been intended, Article 66, UCMJ, undoubtedly, would have been worded in a manner similar to Article 25(a), UCMJ, which says with respect to who may serve on courts-martial: "Any commissioned officer on active duty is eligible to serve. . . ." No such active duty requirement is included in either of the provisions relating to judges, Article 26 or Article 66, UCMJ.

Finally, the fact that I am a Navy captain rather than a Coast Guard captain is not in any way an impediment to service on a Coast Guard court. Assignment of judges from one military branch to courts of another is not precluded by any provision of the Uniform Code of Military Justice at either the trial or appellate levels. As a matter of practice, the Navy has routinely provided trial judges for Coast Guard courts-martial when needed in the past. Moreover, my two immediate predecessors as Chief Judges of this Court were retired Navy captains.

Another relevant fact is that Judge Bridgman and I were first designated as appellate military judges when we were on active duty. He was assigned to the Coast Guard Court of Military Review in 1975 as a captain on active duty and served on the Court in that capacity until 1977. After his retirement, he was assigned again to this Court in 1978 and has served continuously since then.

I was assigned to the Navy-Marine Corps Court of Military Review in 1976 as a Navy captain on active duty and served on that Court in that capacity until 1982. After retirement, I was assigned to this Court in 1985 as Chief Judge and have served in that capacity continuously since that date. Accordingly, our current assignments to this Court are not only consistent with the general duties of commissioned officers with requisite legal credentials, they are also

obviously in keeping with specific past duties that we have performed as commissioned officers on active duty. The previously quoted words from *U.S. v. Coffman*, 35 M.J. at 592, are unmistakably applicable: "A second appointment from the President to a commissioned officer to perform the duties of a military judge is simply not required."

B.

Lack of Fixed Terms for C.G.C.M.R. Judges

As his second basis for challenging this Court, Appellant raises the issue of lack of a specified term of office for the judges on the Court. That, too, had been resolved against the Appellant in an earlier decision by the Navy–Marine Corps Court of Military Review. Subsequent to the filing of briefs in this case, the United States Court of Military Appeals affirmed the Navy–Marine Corps Court of Military Review decision that lack of a fixed term of military judicial office does not result in a denial of due process. *U.S. v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990), *aff'd* 35 M.J. 450 (C.M.A. 1992).

C.

Use of Collateral Duty Judges on C.G.C.M.R.

The third purported defect with respect to this Court is one not previously addressed. Appellant asserts for the first time that appellate military judges serving in a collateral duty capacity deprive this Court of jurisdiction. He cites *U.S. v. Beckermann*, 27 M.J. 334 (C.M.A. 1989) and *U.S. v. Moorehead*, 20 U.S.C.M.A. 574, 44 C.M.R. 4 (1971) for the proposition that general court–martial trial judges must have judging as their primary duty and argues that the same principle should apply to court of military review judges.

1. Civilian Part-Time Judges

The problem with this argument is that part-time judges are an accepted component of both the civilian and military judicial systems. Their utilization in the civilian community is reflected in the American Bar Association's Code of Judicial Conduct. The most recent version of that Code, adopted by the American Bar Association's House of Delegates in August 1990, describes three different categories of such judges in its Terminology section: (a) "continuing part-time judge," (b) "periodic part-time judge," and (c) "pro tempore part-time judge."[2] Included in the definition of "continuing part-time judge" are retired judges subject to recall who are permitted to practice law. Also, within the federal system, part-time magistrate judges are authorized by 28 U.S.C. § 632(b).

2. Military Part-Time Judges

In the military judiciary, judges with other primary duties have been an important element from the very beginning in 1969. It is only the general court-martial judge who, in Article 26(c), UCMJ, is required by law to have judging as a primary duty. No such requirement has been established by Congress for other judges in the military justice system, either at the court of military review level or for special court-martial trial judges. The cases cited by Appellant, *U.S. v. Beckermann, supra*, and *U.S. v. Moorehead, supra*, are limited exclusively to general court-martial judges and the interpretation of Article 26(c), as are the comments from this Court's decision in *U.S. v.*

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[2] The prior Code of Judicial Conduct adopted by the American Bar Association's House of Delegates in 1972, also includes part-time judges but defines them in a more limited manner under its Compliance section.

Beckermann, 25 M.J. 870, 874 (C.G.C.M.R. 1988) quoted in Appellant's brief at 12.

U.S. v. Moorehead, supra, provides background on the legislation in 1968 that established for the first time the judicial offices of military judge and appellate military judge. As indicated in that opinion, only general court-martial judges were expressly required to have judging as their primary duty. Special court-martial judges were excluded from that requirement and, initially, both the Navy and Coast Guard utilized part-time judges for special courts-martial. To this day, while the other services may have chosen by regulation to treat special court-martial judges in a manner similar to general court-martial judges, the Coast Guard has continued to utilize part-time special court-martial judges to accommodate this service's special needs. For the same reason, judges with other duties have been utilized on the Coast Guard Court of Military Review since the establishment of the Court in 1969.

3. C.G.C.M.R. Organization and Procedure

All judges on the Coast Guard Court serve on a continuing basis. Four of our five judges have primary duties that are not associated with their court work. These judges devote time to cases and perform judicial functions on an as-needed basis, participating fully in all their panel decisions, including those with oral argument hearings, which account for approximately one-third of this Court's cases. In those cases orally heard, all panel judges are fully engaged in their panel's preparation, conferencing before and after each hearing, as well as questioning counsel during the argument itself.

Moreover, since this Court has no law clerks, commissioners, or central legal staff to assist in legal research, drafting or editing, all the judges contribute in one or more of these ways with respect to every published opinion. As a result, court opinions that are credited to a particular author-judge always contain much of value from the other judges. When a judge concurs without comment, it invariably means that contributions provided in chambers have been incorporated into the opinion to that judge's satisfaction. Court decisions, and the opinions explaining them, are truly arrived at in a joint fashion.

While the number of cases reviewed by the Coast Guard Court does not warrant five, or even three, full-time judges, the Court organization, which calls for one member with primary duty as chief judge and four others with collateral duty as court of military review judges, has ideally suited the Coast Guard's caseload over the past 23 years. Under this arrangement, each judge is able to devote enough time to assigned cases to fully satisfy the requirements of Article 66, UCMJ. No findings or sentences are affirmed unless a majority of judges determines they are correct in law and fact and should be approved.

The four judges with other primary duties are, at present, Judges Bridgman, Grace, Bastek and Edwards. Judge Bridgman and Judge Bastek are both chiefs of divisions within the Office of Chief Counsel of the Coast Guard. Judge Bridgman is Chief of the Regulations and Administrative Law Division and Judge Bastek is Chief of the Legislation Division. Judges Grace and Edwards have primary duty assignments outside the Office of Chief Counsel. Judge Grace is a member of the teaching faculty of the Industrial College of the Armed Forces located at Ft. McNair as part of the National Defense University. Judge Edwards is Chief of

the Physical Disability Evaluation Division within the Office of the Coast Guard's Chief of Personnel and Training.

As a general rule, the non-judicial duties of the four judges do not relate in any way to matters that come before this Court, presenting no inherent conflict, actual or perceived. If a conflict in a particular case should somehow arise, recusal by the affected judge provides the necessary corrective action. On infrequent occasions in the past when personnel relationships, such as supervisory responsibilities over an officer who was counsel in a case, have prompted a possible perception of conflict of interest, the judge with that perceived conflict has readily recused himself.

4. Other C.M.R. Use of Part-Time Reserve Judges

The Coast Guard is not the only military branch with part-time court of military review judges. All the other services utilize civilian reservists in that capacity to meet distinct military needs. In *U.S. v. Beckermann, supra*, then Chief Judge Everett noted the Navy's pioneer reserve judge program, which, at that time, was limited to trial judges. *Id.* at 27 M.J. 339 n.8. Since then it has been expanded to include court of military review judges of which Marine reservists are an integral component. The program for the Naval service is also no longer limited to reserve officers who are civilian judges. Reserve judges are now used on all but the Coast Guard Court of Military Review and include government attorneys, and civilian practitioners, as well as civilian judges.

While the reserve judge programs of the other service courts of military review may not be identical to that of the Navy-Marine Corps Court of Military Review, they all seem to have at least one common element, the continuing assignment of a judge to a court of military review over a long

term that includes periods of inactive duty and reserve drills. In other words, these judges are not assigned anew to a court of military review every time they drill as judges or are called to active duty. It is our understanding that reserve judges are assigned to a court of military review at the outset and technically remain as members of that court after leaving active duty.

Under this arrangement, at least some of these judges are also understood to perform court work while at home in a civilian status. All judges have other primary duties in various civilian capacities making them truly part-time appellate military judges. Their utilization in a part-time capacity, as with the judges on this Court, is permitted under the Uniform Code of Military Justice to accommodate the differing military requirements between the services, while at the same time maintaining faithful adherence to the uniform structure of our system.

5. Resolution of the Collateral Duty Question

In our view, it would constitute an act of judicial legislation for this Court to go beyond the Article 26(c) requirements relating solely to general court-martial judges and declare that use of court of military review judges with other primary duties is prohibited. We subscribe to the words of Chief Judge Sullivan in *U.S. v. Graf, supra*, where he said with respect to the issue of fixed terms of office for military judges:

> Thus, this Court respectfully declines the invitation in the instant case to legislate by litigation. If it is right that military judges have a fixed term, let Congress by legislation or the President by rule-making, grant a fixed term to these judges. See Chappell v. Wallace, supra at

> 304. Those two branches of Government have the power and the duty to accomplish this task if, after a thoughtful and responsible factfinding process, either branch decides that a fixed term for military judges will better the justice the servicemembers receive. (Citation and footnote omitted)

Id., 35 M.J. at 464.

That rationale applies equally to the issue of part-time judges, as does the Graf opinion's treatment of the question of judicial independence, which Appellant says is adversely impacted by this Court's judges having other primary duties. On this issue, Judge Cox's separate opinion in *U.S. v. Mabe*, 33 M.J. 200, 206 (C.M.A. 1991) offers some insightful observations that warrant repeating since they bear directly on the question of judicial independence. Judge Cox said in Mabe:

> The solution to unlawful influence of military judges is not found in words; it is not found in creating tenure for them or isolating military judges from the world around them. The solution is found in selecting men and women of good character and integrity, persons who want to learn to do a good job, who want to make fair and just decisions, persons with sound judgment.

Id. at 33 M.J. 208

In this Court's *Beckermann* opinion, we said such matters were irrelevant to the ultimate decision because, "it is the institutional or organizational scheme by which judges are detailed . . . that is of concern, not the qualities of the individual so assigned." *U.S. v. Beckermann*, 25 M.J. 870, 874 (C.G.C.M.R. 1988). Appellant argues that, "it is now time to

determine whether appellate military judges must meet the same institutional standards that we require of general courts-martial trial judges." Appellate Defense Counsel's Brief at 12.

The problem with this argument is that "we" did not require general court-martial trial judges to meet certain institutional standards. Congress established that requirement. If those same institutional standards are to be mandated for appellate military judges, it is up to Congress to say so, not us, or any other court. Simply put, this is a matter for the legislature. Until such time as the law is changed in this regard, the solution lies in selecting men and women of good character and integrity as Judge Cox has advanced.

He found the judges in the *Mabe* case to be such persons. Appellant has not contended otherwise with respect to the judges reviewing the instant case. We, too, are satisfied that the part-time members of this Court, past and present, meet the same rigorous standards set out by Judge Cox. Judges of good character and integrity have provided this Court from its inception with the kind of judicial independence that assures due process in every case.

Conclusion

In light of the foregoing, all of Appellant's assignments of error are rejected. We have determined that the findings and sentence are correct in law and fact, and on the basis of the entire record should be approved. Accordingly, the findings and sentence approved below are affirmed.

Judges Bridgman and Bastek concur.

APPENDIX I

U.S. COURT OF MILITARY APPEALS

No. 68352/CG

CMR No. 984

United States, Appellee

v.

Stephan J. Prive, Appellant

ORDER

On further consideration of the granted issues (37 MJ 247) in light of *United States v. Carpenter*, 37 MJ 291 (CMA 1993), and *United States v. Graf*, 35 MJ 450 (CMA 1992), it is by the Court, this 24th day of September 1993

ORDERED:

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of
the Court

CRAWFORD, Judge: I concur with the resolution of the question of part-time judges on the Court of Military Review. and as to whether they need be appointed for fixed terms. However, as to application of the Appointments Clause of the Constitution to these judges, I concur only in the result. *See* my separate opinions in *United States v. Carpenter*, 37 MJ 291, 300 (CMA 1993) and *United States v. Weiss*, 36 MJ 224 (CMA 1992).

APPENDIX J

UNITED STATES COAST GUARD

COURT OF MILITARY REVIEW

CGCM No. 0050

Docket No. 984

United States

v.

Stephan J. Prive, Seaman Apprentice,

U.S. Coast Guard

July 6, 1992

35 M.J. 569

General Court-Martial convened by Commander, Eighth Coast Guard District, New Orleans, Louisiana. Tried at United States Coast Guard Air Station, New Orleans, Louisiana from 5 to 7 March 1991.

Military Judge: CAPT Douglas A. Smith, USCG

Trial Counsel: LT J. A. Wilson, USCGR.

Detailed Defense Counsel: LCDR Christopher A. Abel, USCG.

Appellate Defense Counsel: LCDR G Arthur Robbins, USCG.

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG.

BEFORE

PANEL FIVE

BAUM, GRACE, SHKOR AND EDWARDS[1]

Appellate Military Judges

GRACE, Judge:

The Appellant was convicted of three specifications under Article 112a of the Uniform Code of Military Justice (UCMJ) alleging possession and distribution of LSD. He was sentenced to confinement for three months, reduction to the lowest enlisted paygrade, fined $ 3,000.00, and given a bad conduct discharge. Pursuant to a pretrial agreement, the convening authority disapproved the fine and approved that portion of the sentence extending to reduction in rate to E-1, confinement for three months, and the bad conduct discharge. With the exception of the punitive discharge, the convening authority ordered the approved sentence executed.

The appellant has raised three errors before this Court.

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[1] Judge Edwards did not participate in this decision.

I

APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

II

THE COURT OF MILITARY REVIEW IS WITHOUT POWER TO AFFIRM THE FINDINGS OF GUILTY AND SENTENCE BECAUSE THE APPELLATE MILITARY JUDGES ARE ASSIGNED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

III

APPELLANT'S CONVICTION MUST BE SET ASIDE BECAUSE DUE PROCESS REQUIRES THAT A JUDGE IN A CRIMINAL CASE HAVE A FIXED TERM OF OFFICE. *BUT SEE UNITED STATES V. GRAF*, 32 M.J. 809 (N.M.C.M.R. 1990), *PETITION GRANTED*, 33 M.J. 189 (C.M.A. 1991) (MEM).

ASSIGNMENTS OF ERROR I AND II

The first two assignments were orally argued to the Court and will be addressed together.

The U.S. Navy-Marine Corps Court of Military Review, in *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992), dealt with Assignment of Error I as it applied to a special court-martial military judge. The Court assumed *arguendo* that the Appointments Clause applied to military court-martial judges and found that all military judges must be commissioned officers of the Armed Forces of

the United States and, as such, have by law already been appointed by the President. The Court went on to say:

> The duties these commissioned officers are *detailed* to perform as military judges are within the sphere of their official duties and are germane to the office they already hold. A second appointment from the President to a commissioned officer to perform the duties of a military judge is simply not required. *Cf. Shoemaker v. United States*, 147 U.S. 282, 299–301, 13 S. Ct. 361, 390–391, 37 L. Ed. 170, 185 (1892) [sic] (Army officers (engineers) were not required to obtain a second appointment to perform duties on a commission created by Congress to acquire lands for a park). (Emphasis in original.)

Id., slip op. at 2.

We concur with our brethren on the Navy–Marine Corps Court of Military Review. However, the Appellant in this case has not only challenged the appointment of the military trial judge; he has also challenged the appointment of the judges to this Court. Rather than assuming arguendo that the Constitution's Appointments Clause applies to the designation of judges under the UCMJ, we feel that this case compels us to address this issue directly.

This Court can find no Supreme Court decision that specifically addresses the issue of the appointment of judges to general courts–martial or to the Courts of Military Review. Nor can we find a case which grants to Congress an exception from the Appointments Clause. Therefore, we must examine the principles enunciated by the Supreme Court for guidance in the resolution of this issue of first impression.

Before beginning our search, we will discuss the constitutional and statutory provisions at issue.

THE APPOINTMENTS CLAUSE

Clause 2, § 2 of Article II of the Constitution is known as the Appointments Clause:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

DESIGNATION OF JUDGES UNDER THE UCMJ

The military justice system is a creation of the Congress. Its current iteration is found in the UCMJ (10 U.S.C. § 801 *et seq.*)

Military trial judges and Court of Military Review judges are provided for in the UCMJ, Articles 26 and 66, 10 U.S.C. § 826 and § 866. These articles vest authority over such judges in the Judge Advocate General of the respective armed force.

Article 26(b) provides that:

> A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a

> State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. (10 U.S.C. § 826(b)).

Subparagraph (c) of the same Article says that "the military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. . . ." (10 U.S.C. § 826(c)).

A Court of Military Review has been established by each Judge Advocate General pursuant to Article 66, UCMJ.

> (a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(Art. 66(a), UCMJ, 10 U.S.C. § 866(a)).

Although Article 66 does not specifically state that the Judge Advocate General of the respective service will designate the members of the Military Courts of Review, it does say "each Judge Advocate General shall establish a

Court of Military Review. . ." and "the Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him." Art. 66(a) UCMJ. A fair reading of those provisions leads to the inevitable conclusion that the Judge Advocate General has the power to designate the judges of the Courts of Military Review. That is how the statute has been interpreted since its passage. The military judge in this case and the judges of this Court were all assigned as judges pursuant to the terms of the UCMJ. That fact has not been challenged by the Appellant.

The Appellant's assignments of error rely on the holding of the Supreme Court in *Freytag v. Commissioner of Internal Revenue* (C.I.R.), 111 S. Ct. 2631, 115 L. Ed. 2d 764, 59 U.S.L.W. 4872 (1991), that special judges of the Tax Court, as "inferior officers of the United States," must be appointed by either the President, a court of law or a head of department, as required by the Appointments Clause. The Appellant argues that members of this Court and the trial judge are also "officers" or "inferior officers" of the United States and, therefore, must be appointed in compliance with the Constitution's Appointments Clause. He contends that appointment by the Judge Advocate General, who is not a head of department, does not meet the terms of that clause. As a result, according to the Appellant, the appointments of the trial judge and the judges of this Court were constitutionally defective, leaving both courts without jurisdiction.

OFFICERS AND INFERIOR OFFICERS

OF THE UNITED STATES

Since the Appointments Clause, by its terms applies only to the appointment of "officers" and "inferior officers," we must first determine whether general court-martial judges and judges of this Court fall within those terms. If we find that those positions are not filled by officers, but by mere employees, our examination ends because the Appointments Clause would then not apply.

One commentator on constitutional powers has said the following about officers and employees of the government:

> All federal offices are included within one or another of these modes of appointment: their incumbents are either (1) officers who must be appointed by the President and confirmed by the Senate or (2) they are "inferior Officers" whose appointment may be vested by law in the President alone, the courts, or department heads.
>
> . . . .
>
> . . . . The practical operation of government has, however, given rise to a third category of persons performing federal functions, who constitute by far the most numerous part of the federal service. The persons in this category are designated as "employees" of the United States. The term covers the vast majority of subordinate officials of the Federal Government -- over two million of them -- who have received appointment at the hands of officials other than those stated in the Constitution as capable of being vested by the Congress with the appointing power. Such employees may be appointed in any manner specified by law. It has been

> said, in fact, that anyone working for the Government, not appointed in the manner prescribed by Article II, is not an "officer" but an agent or employee of the Government. In practice, this has enabled appointment to most federal jobs to be made by officers whose own position is lower than that of department heads. (Footnotes omitted.)

2 B. Schwartz, A Commentary on the Constitution of the United States 45–47 (1963).

In order to determine if a position in the government is filled by an officer, the Supreme Court has looked at the duties required of that position. "Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Art. II]." *Buckley v. Valeo*, 424 U.S. 1, 126, 96 S. Ct. 612, 685, 46 L. Ed. 2d 659 (1976).

The Supreme Court in *Freytag v. C.I.R., supra*, looked at the duties performed by special trial judges in the Tax Court of the United States to determine whether or not they were employees or "inferior officers" of the United States. It found that the special trial judges performed more than ministerial tasks. "They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise signficant discretion." *Id.* at 2640. General court-martial judges exercise similar discretion. They take testimony, conduct trials, rule on the admissibility of evidence and, where special trial judges of the Tax Court made recommendations to the chief judge for findings, military judges render final decisions on the law and in some cases on

the facts. Those decisions are subject only to appellate review.

The Courts of Military Review exercise "awesome plenary powers" which includes affirmation of only such findings of guilty and sentences that they find correct in law and fact. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). They are authorized to "weigh the evidence, judge the credibility of the witnesses, and determine controverted questions of fact." They can set aside findings and sentence and can order rehearings. Art. 66 U.C.M.J. 10, U.S.C. § 866. The Courts of Military Review also have "extraordinary writ" power. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979).

When the duties and authority of both general court-martial military judges and judges of the Court of Military Review are compared to those of special trial judges of the Tax Court, it appears that the judges in the military are at least "inferior officers of the United States" and not mere employees. We so hold.

Having found that the judges who are the subject of this appeal are "officers," we must now begin our search for those guiding principles laid down by the Supreme Court which will lead us to an answer to the question of whether there is a constitutionally valid method of designating such judges by a means other than that provided for in the Appointments Clause.

CONGRESS' AUTHORITY TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES

The Constitution grants to Congress certain enumerated powers in Article I, including the power "to provide and maintain a navy" and "to make Rules for the Government and Regulation of the land and naval Forces." It is that authority we must examine in relation to the Article II Appointments Clause.

In a long line of cases, the Supreme Court has recognized and explained Congress' extraordinary powers to regulate the military. Through this line of cases the Supreme Court has clearly demonstrated that Congress has special authority when it comes to regulating the military. In one of the earliest cases to address the issue the Court said:

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

Dynes v. Hoover, 20 How. 65, 79, 61 U.S. 65, 79, 15 L. Ed. 838 (1857).

Following *Dynes v. Hoover, supra*, the Court has repeatedly restated that proposition. "Congress has declared the kinds of trial and the manner in which they shall be conducted. . . ." *Ex parte Milligan*, 4 Wall. 2, 123, 71 U.S. 2,

123, 18 L. Ed. 281, 296 (1866). "Each [the power to legislate and the power to execute laws relating to the military] includes all authorities essential to its due excercise." *Id.* at 139. "Indeed, Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." *Burns v. Wilson*, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953). "Within their proper sphere, courts-martial are constitutional instruments to carry out congressional and executive will." *Palmore v. U.S.*, 411 U.S. 389, 404, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973). "Military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S. Ct. 1, 100 L. Ed. 8 (1955). "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . The military has, again by necessity, developed laws and traditions of its own during its long history." *Parker v. Levy*, 417 U.S. 733, 743, 94 S. Ct. 2547, 2555, 41 L. Ed. 2d 439, 451 (1974). "The laws and traditions governing [military] discipline have a long history . . . they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress." *Schlesinger v. Councilman*, 420 U.S. 738, 757, 95 S. Ct. 1300, 1313, 43 L. Ed. 2d 591, 609 (1975). "It [the exercise by Congress and the Executive of the power to establish and administer courts-martial] too involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." *Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 66, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

Another principle was stated in *Solorio v. United States*, 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987), when the Court said:

> Decisions of this Court after *O'Callahan* have also emphasized that *Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military*. As we recently reiterated, "'judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'" (Emphasis added and citations omitted.)

Id. at 447.

Some of the cases where the Court has adhered to this principle are: *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986) (free exercise of religion); *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) (racial discrimination); *Rostker v. Goldberg*, 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981) (sex discrimination); *Brown v. Glines*, 444 U.S. 348, 100 S. Ct. 594, 62 L. Ed. 2d 540 (1980) (free expression); *Middendorf v. Henry*, 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976) (right to counsel in summary court-martial proceedings); *Schlesinger v. Councilman, supra*, (availability of injunctive relief from an impending court-martial); and *Parker v. Levy, supra* (due process rights and freedom of expression).

> The constitutional grant of power to Congress to regulate the Armed Forces, Art. I, § 8, cl. 14, appears in the same section as do the provisions granting Congress authority, *inter alia*, to regulate commerce among the several States, to coin money, and to declare war. On its face

> there is no indication that the grant of power in Clause 14 was any less plenary that the grants of other authority to Congress in the same section. Whatever doubts there might be about the extent of Congress' power under Clause 14 to make rules for the "Government and Regulation of the land and naval Forces," *that power surely embraces the authority to regulate the conduct of persons who are actually members of the Armed Services*. (Emphasis added.)

Solorio v. United States, supra, at 441.

Just one year earlier the Court had said:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . .
>
> In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

Goldman v. Weinberger, supra, at 507.

Certain constitutional rights are given up upon entry into the armed forces. Specifically, the Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*. . . ." (Emphasis added.) U.S. Const., Amdt. V. In each of the cases mentioned the Court was balancing the protection of individual rights guaranteed by the Constitution

and its amendments, especially the Bill of Rights, against special military necessities.

In *Parker v. Levy, supra*, the Court said:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S. Ct. 1, 5, 100 L. Ed. 8 (1955).

Id. at 743.

Finally in *Rostker v. Goldberg, supra*, the Court said:

> This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference. . . .
>
> . . . .
>
> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional

> question, but simply recognize that the Constitution itself requires such deference. . . . (Citations omitted.)

Rostker v. Goldberg, supra, at 64–67.

It is clear from the cases cited that Congress has authority to establish rules for the government and regulation of the land and naval forces. It is also clear that when the Congress acts under that authority the Supreme Court grants great deference to Congress' judgment, especially in the area where individual rights must yield to overriding military necessity.

In the case at hand, however, the issue is not one of the individual freedoms spelled out in the Bill of Rights, but rather the application of the Article II Appointments Clause, a provision that is a part of the separation of powers.

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one Branch's aggrandizing its power at the expense of another Branch. The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power. (Citation omitted.)

Freytag v. C.I.R., supra, at 2638

The question remains whether the Supreme Court would expand that deference to exempt the Congress from the operation of the Appointments Clause when legislating for the military. There is at least one case in which the Supreme Court found an exemption for Congress in a constitutional provision. In *Northern Pipeline Construction v. Marathon*

Pipe Line Co., supra, the Supreme Court looked at Congress' exercise of authority in creating bankruptcy judges that were not Article III judges with life tenure and the protection of not having their salaries reduced while in office. The Court had no doubt that the bankruptcy judges created by act of Congress were not Article III judges. That left the question whether the Bankruptcy Act of 1978 violated the command of Article III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article. *Id.* at 62. The Court looked at three specific areas where Congress had acted to create "legislative courts" under Article I that did not have to have the attributes of Article III courts.

> But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts. Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. (Footnote omitted.)

Id. at 63–64.

One of the three "narrow situations not subject to [Art. III]" was courts established in the military justice system. What the Court said about Congress' authority to establish a system of military justice is instructive. "It too involves a constitutional grant of power that has been historically understood as giving the political Branches of Government

extraordinary control over the precise subject matter at issue." *Id.* at 66.

We must balance the concerns for the separation of powers articulated in *Freytag v. C.I.R., supra*, with the deference the Court has exercised in congressional legislation relating to the military and the recognized exemption for military courts from the judicial power of the United States found in *Northern Pipeline Construction v. Marathon Pipe Line Co., supra.*

In *Freytag v. C.I.R., supra*, the Court rejected the argument that the Court defer to the Executive Branch's decision that there was no legislative encroachment on presidential prerogatives under the Appointments Clause, since the structural interests implicated in the case were those of the Executive Branch which could look out for itself. *Id.* at 2639.

> The structural principles embodied in the Appointments Clause do not speak only or even primarily of Executive prerogatives simply because they are located in Article II. The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic. (Citation omitted.)

Id. at 2639.

That is a clear statement of the law as it applies generally to the Executive and Legislative Branches of

government. However, the Court in making that statement did not have before it the issue that is present in this case, *i.e.* the deference that must be granted the Congress when legislating with regard to the military. When that factor is added to the scales, we do not believe that the careful balance crafted by the Framers of the Constitution between the Branches of Government is upset.

This exception is being applied to a specialized system of criminal justice within a specialized society, the military. The judges in question are selected on the basis of unique qualifications of experience and knowledge of the military justice system. These selections are not political in nature. They are made by the Judge Advocate General, one who has a direct responsibility for the administration of military justice. Because of the uniqueness of the relationship of the Congress to the military; long recognized by the Supreme Court, we find that the Congress' action in providing for a means of designating military judges by other than the provisions of the Appointments Clause is in keeping with the precedents announced by the Supreme Court. This exception to the application of the Appointments Clause does not do harm to the basic structural foundation of government. To paraphrase the Court in *Northern Pipeline Construction v. Marathon Pipe Line Co., supra*, when properly understood, these precedents represent no broad departure from the constitutional command that *appointments must be made in accordance with the Appointments Clause*. Rather, they reduce to a narrow situation not subject to that command, that recognizes a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to *designate military judges outside of the provisions of the Appointments Clause* was consistent with, rather than

threatening to, the constitutional mandate of separation of powers.

Rather than harm the constitutional separation of powers it is consistent with the Supreme Court's often voiced holdings that Congress is to be granted deference when legislating with respect to the military. It is reasonable to expect that the Court would respect Congress' decision that the Judge Advocate General is the most appropriate official to assign judges in the military justice system.

We, therefore, conclude that Congress, in legislating for the land and naval forces, may provide for the designation of judges within the military justice system in a manner not provided for in the Appointments Clause of the Constitution. Thus, we find that the designation of the military general court-martial judge and the judges of the Coast Guard Court of Military Review was proper and was not in violation of the Constitution.

ASSIGNMENT OF ERROR III

The issue raised in Appellant's third assignment of error, (filed as a supplemental summary assignment after oral argument was heard on Assignments of Error I and II) that the failure of judges in the military justice system to be appointed to fixed terms results in a lack of due process, has been decided this date by another panel of this Court after full briefing. In *U.S. v. Ryder*, 34 M.J. 1259 (C.G.C.M.R. Dkt. No. 947 July 6, 1992), the same assignment of error was rejected on the basis of *United States v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990), *Petition Granted*, 33 M.J. 189 (C.M.A. 1991) (MEM.). We find that decision dispositive.

In light of the foregoing, Appellant's assignments of error are rejected. We have reviewed the record in accordance with our responsibilities under Art. 66, UCMJ and we find no errors which materially prejudice the substantial rights of the accused nor do we consider the sentence to be excessive. The findings and sentence are correct in law and fact and should be approved. Accordingly, the findings and sentence, as approved below, are affirmed.

Judge Shkor concurs.

Baum, Chief Judge (concurring)

I concur with Judge Grace and write separately simply to underscore certain observations. As Judge Grace points out with ample case support, the U.S. Supreme Court has consistently treated the military in a distinctly different fashion from civilian society when applying constitutional provisions. Great deference is accorded the judgment of Congress in the exercise of its authority under Art. I, § 8, cl. 14 of the Constitution of the United States: "To make Rules for the Government and Regulation of the land and naval Forces." For me, that outlook may be illustrated best by the opinion in *Chappell v. Wallace*, 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983), where a unanimous Supreme Court exempted the military from constitutional tort actions available in the civilian sector against government authorities. Some of the language of that opinion has particular relevance to the issue before this Court:

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too

> obvious to require extensive discussion. . . . The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel.

Chappell v. Wallace, 462 U.S. 296, 300, 303–304, 76 L. Ed. 2d 586, 103 S. Ct. 2362

The Court concluded that: "Taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*–type remedy against their superior officers." *Chappell v. Wallace*, 462 U.S. 296, 304, 76 L. Ed. 2d 586, 103 S. Ct. 2362. Those very same factors can just as easily lead to the conclusion that it would be inappropriate to require appointment of military judges in strict compliance with Art. II, § 2, cl. 2 of the Constitution.

Finally, the words of former Chief Justice Warren, quoted with approval by then Chief Justice Burger in *Chappell v. Wallace, supra*, seem particularly apt: "The special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill–equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'" Warren, [The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 188 (1962)] *Id.* at 305.

For all of these reasons, I believe it would be a significant departure from precedent for this Court or any other court to declare that trial and appellate military judges must be appointed as judges under the terms of the

Appointments Clause of the Constitution, Art. II, § 2, cl. 2 rather than in the manner devised by Congress pursuant to Art. I, § 8, cl. 14. This conclusion is reinforced by the fact that the legislation on this subject seems to call for assignment or detailing to military duty as a judge rather than judicial appointment.[2]

Nowhere in the UCMJ is it provided that military judges, trial or appellate, will be appointed.[3] Instead, military

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[2] The military duty aspect of assignment as a judge was addressed in a congressionally mandated study ordered as part of the Military Justice Act of 1983. It accounted in large part for a recommendation against tenure for military judges. It also prompted the three dissenting members of the study commission to recommend a modified form of tenure to accommodate military duty requirements. In making its recommendation against tenure, the commission found that military judges enjoy judicial independence under the present system administered by the Judge Advocates General. *Military Justice Act of 1983's ADV. COMM. REP.*, Vol. 1, at 9 (1984). Perhaps the time has come for Congress to look anew at this subject in view of developments reflected in cases since then such as *U.S. v. Allen*, 33 M.J. 209 (C.M.A. 1991); *U.S. v. Mabe*, 33 M.J. 200 (C.M.A. 1991) and *Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988). See also Baum and Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, Federal Bar News & Journal (June, 1989). If the subject is revisited, Congress would do well to address the questions concerning Article I court status of Courts of Military Review raised by this Court in *Combest v. Bender*, 43 C.M.R. 899 (C.G.C.M.R. 1971). Justice Scalia's views concerning executive agencies which adjudicate, as expressed in his *Freytag* concurring opinion, *Freytag v. C.I.R.*, 115 L. Ed. 2d 764, 111 S. Ct. 2631 at 2654-2657, and joined by three other justices, give added reason for Congressional action on the points outlined in *Combest v. Bender*, 43 C.M.R. 899 at 903-904.

[3] Art. 26, UCMJ relates to military judges for general and special courts-martial. It provides in pertinent part as follows:

(a) A military judge shall be *detailed* to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be *detailed* to any special court-martial. The Secretary concerned shall prescribe regulations providing for the the manner in which military judges are *detailed* for such courts-martial and for the persons who are authorized to detail military judges for such

judges are assigned or detailed to their duties as needed, just as with other military duties. As commissioned officers, they may be reassigned to nonjudicial duties at the will of the Judge Advocate General to meet the needs of the service.

The only exception to this general scheme of things would appear to be at the Court of Military Review level where Art. 66, UCMJ authorizes assignment of civilians as well as commissioned officers. In point of fact, there are no civilians presently assigned to any Court of Military Review. The Coast Guard Court, thought to have been the one

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[3] Cont. courts-martial. . . .

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is *certified to be qualified for duty as a military judge* by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be *designated* by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for *detail* in accordance with regulations prescribed under subsection (a). . . A commissioned officer who is *certified to be qualified for duty as a military judge* of a general court-martial may perform such duties only when he is *assigned* and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. . . . (Emphasis added)

Art. 66, UCMJ provides for Court of Military Review judges as follows:

(a) Each Judge Advocate General shall *establish* a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . Appellate military judges who are *assigned* to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall *designate* as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges *assigned* to the court will serve and which military judge *assigned* to the court will act as the senior judge on each panel. (Emphasis added))

exception, turns out to harbor no civilians. Both Judge Bridgman, who is assigned to another panel of this Court, and I believed ourselves to be civilian judges, but in 1990 Congress made it clear that we are not. In that year the UCMJ was amended by the following addition to Art. 142:

> "For purposes of appointment of judges to the court [U.S. Court of Military Appeals], a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life."

Art. 142(b)(4), UCMJ, 10 U.S.C. § 942(b)(4).

Before his current assignment to this Court, Judge Bridgman retired as a captain from the U.S. Coast Guard after more than 20 years of active service and I retired as a captain from the U.S. Navy after more than 20 years of active service before my assignment here. Accordingly, the rationale of *U.S. v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992), would appear to apply equally to all judges on this Court. Retired and active duty alike, we were all appointed as commissioned officers to the rank of captain by the President with the advice and consent of the Senate and have been assigned to the U.S. Coast Guard Court of Military Review by the General Counsel of the Department of Transporttion in his capacity as Judge Advocate General of the Coast Guard.[4] Our designation and assignment as appellate military judges has been strictly in accord with the Congressional "Rules for the Government and Regulation of the land and naval Forces." Moreover, the terms of Art. II, § 2, cl. 2 of the United States Constitution have been met, as well, by our Presidential appointment as commissioned officers.

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[4] Art. 1(1), UCMJ, 10 U.S.C. § 801(1).

APPENDIX K

U.S. COURT OF MILITARY APPEALS

No. 68493/CG

CMR No. 988

United States, Appellee

v.

Joseph A. Taitano, Appellant

ORDER

On further consideration of the granted issues (37 MJ 219) in light of *United States v. Carpenter*, 37 MJ 291 (CMA 1993) it is by the Court, this 24th day of September 1993

ORDERED:

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of
the Court

CRAWFORD, Judge: I concur with the resolution of the question of part-time judges on the Court of Military Review. However, as to application of the Appointments Clause of the Constitution to these judges, I concur only in the result. *See* my separate opinions in *United States v. Carpenter*, 37 MJ 291, 300 (CMA 1993) and *United States v. Weiss*, 36 MJ 224 (CMA 1992).

APPENDIX L

UNITED STATES COAST GUARD

COURT OF MILITARY REVIEW

CGCM No. 0054

Docket No. 988

United States

v.

Joseph A. Taitano

Seaman Radioman, U.S. Coast Guard

July 7, 1992

General Court-Martial convened by Commander, Maintenance and Logistics Command Pacific. Tried at Coast Guard Island, Alameda, California on 19 December 1991.

Military Judge: CAPT Douglas A. Smith, USCG

Trial Counsel: Lt A. David Fawal, JAGC, USNR

Detailed Defense Counsel: LT Linden H. Joesting, USCG

Appellate Defense Counsel: LCDR G Arthur Robbins, USCG

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

BEFORE

PANEL FIVE

BAUM, GRACE, SHKOR AND EDWARDS[1]

PER CURIAM:

The following three assignments of error have been summarily asserted by Appellant:

I

APPELLANT'S CONVICTION MUST BE SET ASIDE BECAUSE DUE PROCESS REQUIRES THAT A JUDGE IN A CRIMINAL CASE HAVE A FIXED TERM OF OFFICE. *BUT SEE UNITED STATES V. GRAF*, 32 M.J. 809 (N.M.C.M.R. 1990), *PETITION GRANTED*, 33 M.J. 189 (C.M.A. 1991)(MEM.).

II

APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLTION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

III

THE COURT OF MILITARY REVIEW IS WITHOUT POWER TO AFFIRM THE FINDINGS OF GUILTY AND SENTENCE BECAUSE THE APPELLATE MILITARY JUDGES ARE ASSIGNED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

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[1] Judge Shkor did not participate in this decision.

These assignments, after briefing and consideration in two other cases, were rejected by this Court. *U.S. v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *U.S. v. Ryder*, 34 M.J. 1259 (C.G.C.M.R. 1992). Those decisions are dispositive. No other specific issues have been raised by Appellant apart from the three summary assignments. Without admitting that the findings and sentence are correct in fact and law, he has submitted his case on its merits.

Having rejected Appellant's jurisdictional and due process assertions, we have reviewed this record pursuant to Article 66, Uniform Code of Military Justice. Upon such review, we find no error which materially prejudiced the substantial rights of the accused and we do not consider the sentence to be excessive. The findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and suspended sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum and Judges Grace and Edwards concur.

For the Court

/s/

JENIFER A. SANIDAD

Clerk of the Court

APPENDIX M

RELEVANT PROVISIONS OF THE UNIFORM CODE OF MILITARY JUSTICE

10 U.S.C. § 806. Art. 6. Judge advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

10 U.S.C. § 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are--

(1) general courts-martial, consisting of--

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of--

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

10 U.S.C. § 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State

and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any memmber of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

10 U.S.C. § 866. Art. 66. Review by Court of Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

* * *

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

APPENDIX N

RULE FOR COURTS-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, 1984

CHAPTER X. SENTENCING

Rule 1002. Sentence determination

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

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